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No. 97-570

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

DUCHESNE COUNTY, a political subdivision of the State of Utah, UINTAH COUNTY, a political subdivision of the State of Utah,
Petitioners,

v.

UTE INDIAN TRIBE, of the Uintah and Ouray Reservation, Utah, a federally recognized tribe of Indians,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE STATES OF CALIFORNIA AND COLORADO AS *AMICI CURIAE*, IN SUPPORT OF PETITIONERS DUCHESNE COUNTY, UTAH, AND UINTAH COUNTY, UTAH

GALE A. NORTON
Attorney General
State of Colorado
1525 Sherman Street
5th Floor
Denver, CO 80203
(303) 866-3052

DANIEL E. LUNGREN
Attorney General of California

THOMAS F. GEDE *
Special Assistant Attorney General
1300 I Street
Sacramento, CA 95814
(916) 323-7355

* *Counsel of Record for Amici States*

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTERESTS OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	3
I. THE DECISION OF THE COURT OF APPEALS DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN *HAGEN* AND THAT CONFLICT IS READILY APPARENT FROM THE COURT'S RATIONALE	3
A. The Submissions of *Amici* States in *Hagen* Confirm the Direct Conflict	6
1. Brief of *Amici* States in Support of the Petition in *Hagen*	6
2. Brief of *Amici States* in Support of Respondent State in *Hagen*	8
B. The Submissions of Petitioner in *Hagen* Confirm the Direct Conflict	10
II. THE SAME ARGUMENT SUBMITTED BY THE UNITED STATES IN *YANKTON SIOUX TRIBE v. SOUTHERN MISSOURI WASTE MGMT.*, 99 F.3d 1439 (8th Cir. 1996), *CERT. GRANTED SUB NOM. SOUTH DAKOTA v. YANKTON SIOUX TRIBE*, 117 S.Ct. 2430 (1997) (No. 96-1581), CONFIRMS THAT THIS IS AN IMPORTANT FEDERAL QUESTION WITH UNSETTLING CONSEQUENCES THROUGHOUT THE COUNTRY	12
III. THE POSITION ADOPTED BY THE PANEL IN THE TENTH CIRCUIT HAS BEEN ACKNOWLEDGED TO CREATE UNPRECEDENTED "JURISDICTIONAL CHAOS"	15

TABLE OF CONTENTS—Continued

Page

IV. THE DECISION OF THE PANEL ALSO CONFLICTS IN PRINCIPLE WITH ALL OTHER DISESTABLISHMENT PRECEDENT OF THIS COURT AND WITH EVERY CASE IN EVERY CIRCUIT THAT HAS CONSIDERED SIMILAR QUESTIONS 16

CONCLUSION 17

TABLE OF AUTHORITIES

CASES: Page

DeCoteau v. District County Court, 420 U.S. 425 (1975) ..... *passim*
Hagen v. Utah, 510 U.S. 399 (1994) ..... *passim*
Mattz v. Arnett, 412 U.S. 481 (1973) 8, 14, 16
Pittsburg & Midway Coal Mining Co. v. Yazzie, 909 F.2d 1387 (10th Cir. 1990), *cert. denied*, 498 U.S. 1012 (1990) 16, 17
Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) 8, 14, 16, 17
Seymour v. Superintendent, 368 U.S. 351 (1962) 2, 8, 14, 16
Solem v. Bartlett, 465 U.S. 463 (1984) 2, 8, 14, 16
State v. Hagen, 858 P.2d 925 (Utah 1992) 6
United States v. Pelican, 232 U.S. 442 (1914) 17
Ute Indian Tribe v. Utah, 521 F.Supp. 1072 (D.Utah 1981) 10
Ute Indian Tribe v. Utah, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994 (1986) 2
Ute Indian Tribe v. Utah, 935 F.Supp. 1473 (D.Utah 1996) 5
Ute Indian Tribe v. Utah, 114 F.3d 1513 (10th Cir. 1997), *reh'g denied* (July 1, 1997) 5, 6, 15
Yankton Sioux Tribe v. Southern Missouri Waste Management, 99 F.3d 1439 (8th Cir. 1996), *cert. granted sub nom. South Dakota v. Yankton Sioux Tribe*, 117 S.Ct. 2430 (1997) (No. 96-1581) 12

STATUTES:

18 U.S.C. § 1151(b) 13
18 U.S.C. § 1151(c) 13

OTHER AUTHORITIES:

Robert L. Stern, *et al.*, *Supreme Court Practice* (7th ed. 1993) 4, 17
Supreme Court Rule 10 4
David R. Williams, *State v. Perank: Is the Uintah-Ouray Reservation "Nailed Down Upon the Border?"*, 1992 B.Y.U.L. Rev. 1247 7

TABLE OF AUTHORITIES—Continued

Page

Petition for Writ of Certiorari, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281) 6

Brief of Petitioner, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281) 10

Appendix (I) to Brief of Petitioner, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281) 6

Brief of Respondent, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281) 6, 10

Reply Brief of Petitioner, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281) 11

Brief for the States of California, North Dakota, South Dakota, and Washington, as *Amicus Curiae* in Support of Respondent State of Utah, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281) 2, 3, 7, 8

Brief for the States of South Dakota, Arizona, California, Montana, Nevada and Oklahoma, as *Amicus Curiae* in Support of Respondent State of Utah, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281) 3, 9, 10

Transcript of Oral Argument, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281) 11

Brief of *Amicus Curiae* Ute Indian Tribe in Support of Petition for Rehearing, *Hagen v. Utah*, 510 U.S. 399 (1994) (No. 92-6281) 15

Brief for the United States as *Amicus Curiae* in Support of Plaintiffs-Appellees, *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 99 F.3d 1439 (8th Cir. 1996) (No. 95-2647) 12, 13, 14

Reply Brief of State of South Dakota, *South Dakota v. Yankton Sioux Tribe* (August 7, 1997) (No. 96-1581) 13

Brief for the United States as *Amicus Curiae* in Support of Respondents, *South Dakota v. Yankton Sioux Tribe* (September 24, 1997) (No. 96-1581) 12

TABLE OF AUTHORITIES—Continued

Page

Brief of Charles Mix County, South Dakota, as *Amicus Curiae* in Support of Petitioner State of South Dakota, *South Dakota v. Yankton Sioux Tribe* (August 7, 1997) (No. 96-1581) 12

Brief of Duchesne County, Utah and Uintah County, Utah, as *Amicus Curiae* in Support of Petitioner State of South Dakota, *South Dakota v. Yankton Sioux Tribe* (August 7, 1997) (No. 96-1581) 13

Petition for Writ of Certiorari, *Duchesne County and Uintah County, Utah v. Ute Indian Tribe* (September 29, 1997) (No. 97-570) 4, 6, 11, 15

Appendix to Petition for Writ of Certiorari, *Duchesne County and Uintah County, Utah v. Ute Indian Tribe* (September 29, 1997) (No. 97-570) 4, 6

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BRIEF FOR THE STATES OF CALIFORNIA AND COLORADO AS *AMICI CURIAE*, IN SUPPORT OF PETITIONERS DUCHESNE COUNTY, UTAH, AND UINTAH COUNTY, UTAH

INTERESTS OF *AMICI CURIAE*

Federal Indian law decisions in the Tenth Circuit are always the subject of special concern because of the considerable reservation acreage within that circuit. For that reason, the State of California appeared as an *Amici Curiae* in *Hagen v. Utah*, 510 U.S. 399 (1994). As we told the Court at that time, the *Amici* States' interests in *Hagen* were substantial:

> This case presents an issue of substantial importance to *Amici* and other States with present and former Indian reservations. In 1985, the United States Court of Appeals for the Tenth Circuit concluded

> that Acts of Congress with operative language restoring Indian reservations to the public domain were *not* intended to *disestablish* those reservations. *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994 (1986). The Court of Appeals premised its decision on a misreading of *Solem v. Bartlett*, 465 U.S. 463 (1984), and plaintiffs in New Mexico and elsewhere specifically relied on this misreading in an attempt to *resurrect boundaries* of Indian reservations long deemed *disestablished*. . .
>
> *Amici* States have an obvious sovereign interest in knowing, with *some degree of certainty, where the boundaries of Indian reservations are located.* The present petition presents a valuable opportunity to continue the process, begun by the Court's modern decisions in *Seymour v. Superintendent*, 368 U.S. 351 (1962), of defining the manner in which surplus land statutes of this kind affected Indian reservations throughout the United States.

Br. for the States of California, North Dakota, South Dakota, and Washington, as *Amici Curiae* in Supp. of Resp't State of Utah at 1-2, *Hagen*, (No. 92-6281) (footnote omitted) (emphasis added).

The decision of this Court in *Hagen* went a long way toward defining and clarifying the manner in which public domain statutes of this kind affected Indian reservations. The decision of the panel in the Tenth Circuit has directly turned *Hagen* on its head, causing more uncertainty and confusion than existed prior to that time.[1]

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[1] *Amici* States understand that Utah has filed an Appearance and Waiver Form in this Court indicating that while it was aligned with Petitioners below, the State has not joined in the filing of a Petition and did not anticipate any response "unless requested by the Court." According to the Petitioner Counties, settlement discussions on unrelated and related issues presumably prompted this decision. These considerations do not, of course, have any bearing on the merits of the Petition for Certiorari or the views expressed by the *amici* States in this *amici* brief.

SUMMARY OF ARGUMENT

The decision of the court of appeals directly conflicts with the decision of this Court in *Hagen*. Although the United States has apparently shifted its position, arguments submitted by the United States in another circuit confirms that this is an important federal question with unsettling consequences throughout the Country. In addition, the position adopted by the Tenth Circuit has been acknowledged to create unprecedented "jurisdictional chaos." Moreover, it conflicts in principle with all other disestablishment precedent of this Court and with every case in every circuit that has considered similar questions.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN *HAGEN* AND THAT CONFLICT IS READILY APPARENT FROM THE COURT'S RATIONALE.

INTRODUCTION

In November 1992, the State of California was one of several western states to join in an *amici curiae* brief in *Hagen* in support of the Respondent Utah, concurring that the Petition for a Writ of Certiorari should be granted. Br. for the States of California, North Dakota, South Dakota, and Washington, as *Amici Curiae* in Supp. of Resp't State of Utah at 1-2, *Hagen*, (No. 92-6281). On the merits, the State of California joined in an additional brief for the States in further support of Respondent. Br. for the States of South Dakota, Arizona, California, Montana, Nevada and Oklahoma, as *Amici Curiae* in Supp. of Resp't State of Utah, *Hagen*, (No. 92-6281). As a result, the *Amici* States are very much aware of the question presented and decided in *Hagen*. The decision of the Tenth Circuit Court of Appeals in this case is in direct conflict with *Hagen* and that conflict is readily apparent from the rationale stated in the opinion. Pet. App. at 32a-35a (crux of court of appeals opinion).

Because the proceedings here are intertwined and tied to *Hagen* in every respect, this conflict is "truly" direct. Robert L. Stern, et al., *Supreme Court Practice*, § 4.5, at 174 (7th ed. 1993). As such, according to *Supreme Court Practice*, this case presents "one of the strongest possible grounds for securing the issuance of a writ of certiorari." *Id.* Sup. Ct. R. 10. The decision of this Court in *Hagen* has been grossly misconstrued by the Tenth Circuit Court of Appeals and that misconstruction could potentially disturb settled law throughout the Country. For these reasons, *Amici* States strongly urge this Court to grant certiorari and fashion appropriate relief.

In essence, the court of appeals held that, in *Hagen*, this Court *found* that Congress intended to somehow remove only homestead and townsite lands from the Uintah reservation, without otherwise disturbing historic reservation boundaries. Such a holding by this Court, however, would have been unprecedented and it would have been in conflict with all prior decisions of this Court (and every other court). Moreover, it would also result in "jurisdictional chaos," a fact that was unequivocally conceded in the *Hagen* proceedings. Pet. at 10-12. Nothing in *Hagen*, fairly construed, should have led the panel to the conclusion adopted here.

The reasoning of the panel supporting this conclusion can be readily examined because it is limited to two brief paragraphs. With historic reservation boundaries in place, the panel concluded that three other categories of non-trust lands would still be Indian country (i.e., the fee lands apportioned to the terminated Utes in the 1950's, the lands allotted to individual Indians that passed into fee status after 1905, and the lands that were held in trust after the Reservation was opened in 1905 but that since have been exchanged into fee status . . .). *Ute Indian Tribe*, 114 F.3d at 1529, Pet. App. 32a-33a.

> With respect to the other three categories of non-trust lands, the state and local defendants argue that these lands also are no longer within Indian country after *Hagen*. They contend that the Supreme Court

> in *Hagen* "clearly contemplated that the exterior boundaries of the Reservation would simply be gone." Appt. Brief, at 44. In other words, the defendants argue that the Court held that the 1902-1905 legislation completely terminated the Reservation such that no discrete, definable reservation boundaries now exist. Under the defendants' theory, there are no external boundaries and thus no "limits of any reservation." Indian country therefore is confined under § 1151(c) to "Indian allotments . . . which have not been extinguished," or trust lands. Under the theory that Indian country is limited to trust lands, the defendants argue that the three disputed categories of non-trust lands no longer constitute Indian country.
>
> We reject the defendants' argument that *Hagen* removed all non-trust lands within the original Uintah Valley Reservation from Indian country. In *Hagen*, the Supreme Court did not decide that the 1902-1905 allotment legislation completely disestablished the Uintah Valley Reservation, erasing its outer boundaries and rendering § 1151(a) inapplicable to the three disputed categories of non-trust lands. The Court in *Hagen* stated: . . . The Court stated that the Uintah Valley Reservation had been "diminished"—not "disestablished," "eliminated," or "terminated." Moreover, the diminishment was only "with respect to those lands" that had been restored to the public domain under the 1902-1905 legislation. *See Ute Indian Tribe IV*, 935 F.Supp. at 1487-88. We therefore conclude that *Hagen* did not erase the boundaries of the Uintah Valley Reservation and that the current "limits of [the] reservation" thus embrace the three categories of non-trust lands at issue. In sum, *Hagen* does not conflict with our holding in *Ute Indian Tribe III* that these categories of non-trust lands remain within Indian country under section 1151(a).

Ute Indian Tribe, 114 F.3d at 1530, Pet. App. 34a-35a.

In this respect, Petitioners have certainly demonstrated that the fundamental error of the panel centered around a failure to view the language of *Hagen* in context. This

amici brief is intended to unequivocally confirm that position.[2]

A. The Submissions of *Amici* States in *Hagen* Confirm the Direct Conflict.

1. *Brief of* Amici *States in Support of the Petition in* Hagen.

From the beginning, the States participating in *Hagen* as *amici curiae* also viewed the *Hagen* issue as it has

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[2] Remarkably, nothing in the *Hagen* decision and nothing in the *Hagen* record can be cited to independently establish that the offense in *Hagen* would even be entirely excepted from Indian country under the panel's decision. The Utah Supreme Court opinion in *Hagen* expressly stated that:

> The plea Affidavit stated that defendant sold marijuana from his *residence* in Myton, Duchesne County, Utah.

State v. Hagen, 858 P.2d 925 (Utah 1992) (emphasis added). The Petiton noted that the offense took place in Myton, Utah. Pet. at 3, *Hagen* (No. 92-6281). The Statement of the Case in the Brief for Respondent State of Utah stated that the "offense occurred on *non-Indian lands near* the town of Myton, Utah." Br. for Resp't at 2, *Hagen* (No. 92-6281). (The "non-Indian lands" description, as opposed to lands held in trust for the tribe or its members, was the *traditional* determinative factor prior to this jurisdictional dispute, as *Hagen* establishes.) *See also* District Court of Duchesne County Transcript: "[T]his court is well aware the state takes the position that the Uintah Ouray reservation consists of trust lands, and that there is no testimony that the defendant was residing on trust land." Pet. App. I at 18, *Hagen* (92-6281). Under the panel's decision, historic boundaries still exist. As a result, this "non-Indian lands"/"trust lands" distinction would be meaningless.

The town of Myton, Utah, is certainly not Indian country, as *Hagen* establishes, and as the panel recognized. *Ute Indian Tribe v. Utah*, 114 F.3d 1513 (10th Cir. 1997). Nevertheless, under the criteria expressly set forth in the panel's opinion, a "title search" would have been necessary to establish jurisdiction in *Hagen* in the first instance. Pet. App. 35a. Of course, that was not the case in *Hagen*. The criminal offense occurred at Hagen's "residence" on non-Indian lands, a description sufficient for the traditional checkerboard tract search required by this Court. *DeCoteau*, 420 U.S. at 427 n.2, 446-447, *Rosebud*, 430 U.S. at 615, 615 n.48, *Solem*, 465 U.S. at 467 n.8.

been represented to this Court by Petitioners: namely, whether historic reservation boundaries in Utah were disestablished by the public domain acts in question. As we told this Court at the time the issue was first presented:

> Heretofore, the equation of public domain language with reservation *disestablishment* has been a *universally* accepted principle of federal Indian law.

Br. for the States of California, North Dakota, South Dakota, and Washington, as *Amici Curiae* in Supp. of Resp't State of Utah at 2, *Hagen*, (No. 92-6281) (emphasis added).

This Court in *Hagen* confirmed that assessment, but the Court of Appeals lost sight of that disestablishment principle in deciding this case.[8] Instead, the panel held that except for the homestead and townsite lands (but not other fee lands in the area) being somehow removed from Indian country status, the historic reservation boundaries otherwise remain intact. This was not the holding in *Hagen*.

Throughout the argument of the *amici curiae* States in *Hagen*, the issue was consistently and repeatedly referred to in the *traditional* manner:

> Until the *en banc* majority's decision, no court seriously questioned that operative language was not precisely suited to *disestablishment*.
>
> Indeed, in 1975, when this Court framed the issue in *DeCoteau v. District County Court*, 420 U.S. 425 (1975), it did so in terms of an underlying inquiry for "public domain" indicia:
>
> > These two cases, consolidated for decision, raise the single question whether the Lake Traverse Indian Reservation in South Dakota, created by an 1867 treaty between the United States and

[8] Even before *Hagen*, commentators agreed with this assessment. David R. Williams, *State v. Perank: Is the Uintah-Ouray Reservation "Nailed Down Upon the Border?"*, 1992 B.Y.U.L. Rev. 1247.

> the Sisseton and Wahpeton bands of Sioux Indians, was *terminated and returned to the public domain, by the Act of March 3, 1891. DeCoteau, supra* at 426-427 (emphasis added).
>
> Even the *Rosebud* dissent expressly acknowledged that "restored to the public domain" was "clear language of express *termination*," as the Utah Supreme Court noted. Resp. App. 21a-22a. *Rosebud*, 430 U.S. at 618 (Marshall, J., dissenting).
>
> During the late 1800's and early 1900's Congress and the President frequently used public domain language to open Indian reservations for entry and settlement. Until the decision of the *en banc* majority, such restoration-to-the-public-domain language meant that the reservation was *disestablished*, a point well understood by the Utah Supreme Court, by this Court, by Congress, by the President, by the Department of the Interior and by the Department of Justice.

Id. at 3, 3-4, 4-5, 7-8 (footnotes omitted) (emphasis added).

Under the holding of the panel, the "disestablishment," "terminated," and "disestablished" descriptions noted there are rendered meaningless—yet these are terms *amici* states have understood according to the meanings given them under this Court's precedent in *Seymour, Mattz, DeCoteau, Rosebud* and *Solem*.

2. *Brief of* Amici *States in Support of Respondent State in* Hagen.

On the merits, the States' *amici* brief made clear that the issue in *Hagen* was whether the reservation was "disestablished" except for the "trust" lands. For example, in the "Summary of Argument:"

> As *Solem* itself indicates, through reference to *Seymour v. Superintendent*, 368 U.S. 351, 355 (1962), as cited at *Solem*, 465 U.S. at 470, language of an act which affirmatively returns land to the "public domain" is such "other language," which

> evidences a "total surrender of all tribal interests" and thus operates to *disestablish* the reservation. . . .
>
> Congress, in the "operative language," restored the subject lands to the public domain, and thus, in line with the well-established precedent *disestablished the reservation boundaries.*

Br. for the States of South Dakota, Arizona, California, Montana, Nevada and Oklahoma, as Amici Curiae in Supp. of Resp't State of Utah at 4, 6, *Hagen*, (No. 92-6281) (emphasis added).

Under the holding of the panel, the "disestablish the reservation" and "disestablished the reservation boundaries" descriptions noted there are also rendered meaningless.

Throughout the argument and in the conclusion, *amici* States in *Hagen* made the point several times, in several ways, but the issue remained the same. *Id.* at 7, 9, 10, 11, 12-13, 13, 14, 17. Again, the panel rendered meaningless the terms "termination," "disestablishment," "no outside boundary line," and "existence or nonexistence of reservation boundaries." *Id.*

With specific reference to the fact that reservation boundaries surrounding all lands (not just homestead and townsite lands) were at issue, as Petitioners establish, our merits brief in *Hagen* also unequivocally supports that conclusion. In the process of confirming that the number of tribal members living in the disputed areas (i.e. on nontrust lands) was not substantial, the "issue before this Court" was cast in the following terms:

> Further, of those 1,500 members, only about 300 live on the *actual nontrust lands at issue* before this Court. . . . Thus, using the figures most generously to the Tribe, approximately 92% of the persons within the historic boundaries are non-Indian. Utilizing the number of Native Americans who reside upon the *land actually at issue in this case*, the statistics become even more overwhelming. Of the approximately 18,000 persons who live on the *nontrust*

> *areas*, over 98% are non-Indian; only about 300 Native Americans live in the *nontrust areas*, as noted above.

Id. at 16 (emphasis added).

Under the holding of the panel, all the "nontrust lands" and "nontrust areas" descriptions noted there are rendered meaningless.[4]

B. The Submissions of Petitioner in *Hagen* Confirm the Direct Conflict.

As the Counties have noted, this is also the context in which the descriptions of Petitioner in *Hagen* were submitted. For example:

> The *status* of the Uintah Valley Reservation was the focus of attention, not the periphery of concern in the federal court litigation. . . . If the Court upholds the State of Utah Supreme Court decision of July 17, 1992, then the State of Utah and its subdivisions will exercise general civil and criminal jurisdiction over Indians whenever they are located off *trust* lands. . . .

Br. of Pet'r. at 16-17, 29, *Hagen*, (No. 92-6281) (emphasis added).

Again, under the holding of the panel, the "trust" lands descriptions noted there are rendered meaningless. And in the Reply Brief, Petitioner in *Hagen* reiterated the point in unequivocal terms:

> Before the Court today, Utah seeks a ruling that, in fact, the *boundaries* of the Uintah Valley Reservation

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[4] The *Hagen* reference map, Ex. I-1B, was reproduced as Appendix B in the Brief for Respondent State of Utah (and was also a part of the trial record in *Ute Indian Tribe v. Utah*, 521 F.Supp. 1072 (D.Utah 1981)). Br. for the Resp't at App. B, *Hagen* (No. 92-6281). This map is keyed to "original" reservation boundaries and "general land ownership." *Id.* at 6 n.3, *Hagen* (No. 92-6281). Significantly, the distinctions adopted by the panel, among fee lands, are not even depicted in the "general land ownership" designations relied on by the parties. In this respect, the *Hagen* map designated all Indian trust land as "Indian land" and all privately owned nontrust lands as "private lands," in the traditional manner.

> were *disestablished* . . . federal courts preserving the boundary of the Uintah Valley Reservation. . . . This appeal will determine whether the State of Utah criminal justice system (as opposed to federal and tribal courts) will prosecute Indians committing crimes on . . . presently owned in *fee* by non-Indians.

Reply Br. of Pet'r. at 2, 16-17, *Hagen*, (No. 92-6281) (emphasis added).

Under the holding of the panel, the "boundaries," "disestablished," and "fee" lands descriptions noted there are rendered meaningless.

At oral argument, counsel for Petitioner in *Hagen* (who also represented the Ute Tribe in the district court, the court of appeals, and before this Court in opposing certiorari in the *Ute Indian Tribe* litigation), presented the question in these terms:

> MR. SENECA: [T]he question presented is whether or not the *boundary* of the Uintah Reservation was *disestablished*. . . . MR. SENECA: . . . Now, it's couched in terms of whether or not the reservation was *disestablished*, and the reason it's couched in those terms is that if the reservation *boundary* had been *disestablished*, then Myton, Utah, is not in Indian country. . . . MR. SENECA: [T]his Court is going to have to decide whether or not that reservation *boundary* has been *disestablished* or not.

Tr. or Oral Argument at 3, 5, 9, *Hagen*, (No. 92-6281) (emphasis added).

Under the holding of the panel, the "boundary" and "disestablished" descriptions noted there are rendered meaningless.

The Counties have set forth at great length similar submissions of the Ute Tribe and the United States in *Hagen* and the substance of that documentation need not be repeated here. Pet. at 22-27. It should be sufficient to merely note that all sources confirm the same understanding of the issue presented and decided in *Hagen*.

All of this documentation is to no avail under the holding of the panel. In this instance, the panel in the Tenth Circuit is certainly mistaken. In *Hagen*, this Court did exactly what Petitioner requested, but decided that the "reservation boundary has been disestablished." *Id.*

II. THE SAME ARGUMENT SUBMITTED BY THE UNITED STATES IN THE EIGHTH CIRCUIT IN *YANKTON SIOUX TRIBE v. SOUTHERN MISSOURI WASTE MGMT.*, 99 F.3d 1439 (8th Cir. 1996), *CERT. GRANTED SUB NOM. SOUTH DAKOTA v. YANKTON SIOUX TRIBE*, 117 S.Ct. 2430 (1997) (No. 96-1581), CONFIRMS THAT THIS IS AN IMPORTANT FEDERAL QUESTION WITH UNSETTLING CONSEQUENCES THROUGHOUT THE COUNTRY.

The United States clearly understands the generic nature of this argument and the extent to which the decision of the panel in the Tenth Circuit conflicts with *Hagen* and other precedent of this Court. Although the United States has now shifted its position in this Court, the United States submitted the same argument in another case, in another circuit, not involving public domain language, but rather a statutory cession of all unallotted lands. Br. for United States as Amicus Curiae in Supp. of Plaintiffs-Appellees at 17 n.6, *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 99 F.3d 1439 (8th Cir. 1996) (95-2647). In that instance, the United States candidly stated, for the first time, that its interest as *amicus curiae* was in "protecting the integrity of reservation boundaries." *Id.* at 1.

The panel in the Eighth Circuit had no occasion to squarely address the issue because it held the original boundaries of the Yankton Sioux reservation were saved by other language and not disestablished by the cession in question, as others have already pointed out in that case. Br. of Charles Mix County, South Dakota, *Amicus Curiae*, in Supp. of Pet'r, State of South Dakota at 30

n.11; Br. of Duchesne County, Utah and Uintah County, Utah, *Amici Curiae*, in Supp. of Pet'r, State of South Dakota at 2, 3-4, *South Dakota v. Yankton Sioux Tribe* (No. 96-1581) (August 7, 1997). In addition, the State of South Dakota has correctly noted that before this Court, neither the Yankton Sioux Tribe nor the United States "now disputes" that, if *Yankton* is reversed, "Indian country" status will be limited to unextinguished allotments (18 U.S.C. § 1151(c)) and "dependent Indian communities" (18 U.S.C. § 1151(b)). Reply Br. of State of South Dakota at 20 n.19, *Yankton Sioux Tribe*, (No. 96-1581). Nevertheless, this shift in position by the United States might be prompted by the fact that a petition is still pending in this case. There is little doubt that if this petition is denied, the "post-*Hagen*" argument will be resubmitted by the United States in *other* cases. For these reasons, the argument of the United States as submitted in the Eighth Circuit raises considerable concern for *amici* States.

When *Yankton* was before the Eighth Circuit, the United States, in one sweeping footnote, submitted a modified form of the post-*Hagen* argument applied to the Yankton cession. Disregarding all disestablishment precedent, the United States summarily concluded:

> Article I of the 1892 Agreement provides only that "the unallotted lands within the limits of the [Yankton Sioux] reservation" are ceded to the United States, and it was only such lands that were covered by the Presidential Proclamation of May 16, 1895. As a result, the State's reliance on Articles I and II of the 1892 Agreement for the proposition that the Reservation was diminished can extend no further than those unallotted lands. The other lands owned by non-Indians on the Reservation presumably were once allotted to tribal members but later sold to non-Indians. The State has pointed to nothing in the 1892 Agreement to suggest that these lands were removed from the Reservation any more than that the allotted lands that remain in Indian ownership

> were removed from the Reservation. The State's argument in this case, therefore, would yield the anomalous result that some non-Indian land within the Reservation boundaries is part of the Reservation and some is not, which would complicate the jurisdictional maze beyond even that caused by the checkerboard pattern of Indian ownership. Because only Congress may alter reservation boundaries, *see Solem*, 465 U.S. at 470, the size of (and parcels constituting) the Reservation could not have been affected by subsequent transfer of lands from Indians to non-Indians.

Br. for United States as Amicus Curiae in Supp. of Plaintiffs-Appellees at 17 n.6, *Yankton Sioux Tribe v. Southern Missouri Waste Management Dist.*, 99 F.3d 1439 (8th Cir. 1996) (95-2647).

At this juncture, two important points in this argument should be noted. First, no State has ever made an argument that would support the "anomalous result" the United States has suggested. *Id.* Contrary to the assertion of the United States (without citation to any authority), the States have consistently argued in all cases, including *Hagen*, that the issue was whether the affected reservation area was "disestablished" except for "trust land." Nothing in the submissions or the decisions of *Seymour v. Superintendent*, 368 U.S. 351 (1962), *Mattz v. Arnett*, 412 U.S. 481 (1973), *DeCoteau v. District County Court*, 420 U.S. 425 (1975), *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), *Solem v. Bartlett*, 465 U.S. 463 (1984) or *Hagen*, can be cited to support any other conclusion. Even a cursory review of the submissions of the United States in those same cases undermines the entire argument.

Secondly, the generic nature of this argument is of critical concern. Because the operative language of all surplus land statutes, including those addressed in *Seymour, Mattz, DeCoteau, Rosebud, Solem* and *Hagen*, is always directed to only "unallotted lands," the same

argument in favor of resurrecting original reservation boundaries could be made throughout the Country—in cases already decided, as well as in future litigation. Nothing in *Hagen* supports this anomalous result.

A third point in this argument, a critical concession by the United States that, as a result, the jurisdictional maze will be complicated beyond that "caused by the checkerboard pattern of Indian ownership" is addressed *infra*. *Id.*

III. THE POSITION ADOPTED BY THE PANEL IN THE TENTH CIRCUIT HAS BEEN ACKNOWLEDGED TO CREATE UNPRECEDENTED "JURISDICTIONAL CHAOS."

In the petition, the Counties have detailed the circumstances under which the Ute Tribe previously acknowledged, before this Court, that the "jurisdictional chaos" created by this concept is unfathomable. Pet. at 10-14; ("virtually impossible") ("absurd situation") Br. of Ute Indian Tribe in Supp. of the Pet. for Reh'g at 4-5, *Hagen*, (92-6281). And the panel specifically recognized that a *title search* would be necessary to implement this unprecedented concept (involving hundreds of thousands of acres of lands in this area alone). *Ute Indian Tribe v. Utah*, 114 F.3d at 1530 (emphasis added), Pet. App. 35a. Nevertheless, the panel simply noted that "this conclusion has the benefit of producing a stable, unchanging allocation of jurisdiction." *Id.* In the process, the panel never acknowledged, discussed, or even mentioned the unprecedented "jurisdictional chaos" previously admitted by the Ute Indian Tribe.

The United States also refused to address the "jurisdictional chaos" admission. However, in the *Yankton* submission discussed *supra* at 12-15, the United States conceded the *problem*, as well as the fact that it would exist *everywhere* the argument is accepted ("complicate the jurisdictional maze beyond even that caused by the checkerboard pattern"). *Id.* In both respects these are

significant concessions insofar as the United States consistently claims that law enforcement authority and concern for effective administration of justice in Indian country are significant factors in every argument.

In addition, the panel succinctly stated that their "approach" was "more desirable" than the "moving checkerboard" (previously *approved* by this Court in *Seymour, Mattz, DeCoteau, Rosebud, Solem* and *Hagen*). *Id.* at 1530. *See also Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1420-1422 (10th Cir. 1990), *cert. denied*, 498 U.S. 1012 (1990), decided on the basis of precedent from this Court. In this light, the opinion of the Tenth Circuit is conflicting, untenable, and unworkable.

Moreover, the deficiencies and conflicts inherent in such a scheme are not resolved simply because opposing arguments have not addressed them, as will predictably be the case here. In this instance, the Court should focus on this issue and authoritatively resolve it before the consequences become unduly burdensome in former Indian country areas across the Country.

IV. THE DECISION OF THE PANEL ALSO CONFLICTS IN PRINCIPLE WITH ALL OTHER DISESTABLISHMENT PRECEDENT OF THIS COURT AND WITH EVERY CASE IN EVERY CIRCUIT THAT HAS CONSIDERED SIMILAR QUESTIONS.

Amici States are not aware of any decision anywhere that has reached a conclusion consistent with the position adopted by the courts below. We are certain that Respondents cannot cite any decision that directly supports that position. As a result, in addition to the direct conflict with *Hagen*, the decision of the panel conflicts in principle with the disestablishment precedent of this Court in the decisions of *Seymour, Mattz, DeCoteau, Rosebud* and *Solem*, as well as all related cases in every circuit (and all state decisions as well). In other words, the decision in this case is the first case in the history of this

type of litigation to leave substantial non-Indian fee lands within historic reservation boundaries, *after an area has been restored to the public domain or otherwise subject to some type of disestablishment surplus land statute.*

In this light, it is not surprising that the decision has also resulted in an intracircuit conflict. *See Yazzie*, 909 F.2d at 1420-1422 approvingly citing and quoting *DeCoteau*, 420 U.S. at 446, 447 and *Yazzie*, 909 F.2d at 1421-1422 approvingly citing and discussing *Rosebud* and *United States v. Pelican*, 232 U.S. 442 (1914). Because this intracircuit conflict relates to a recurring and important issue (*Supreme Court Practice* at 176), it too is not without significance here.

CONCLUSION

The petition for certiorari should be granted and this Court should fashion appropriate relief.

Respectfully submitted,

GALE A. NORTON
Attorney General
State of Colorado
1525 Sherman Street
5th Floor
Denver, CO 80203
(303) 866-3052

DANIEL E. LUNGREN
Attorney General of California
THOMAS F. GEDE *
Special Assistant Attorney General
1300 I Street
Sacramento, CA 95814
(916) 323-7355
* *Counsel of Record for Amici States*